Supreme Court, U.S.
FILED
MAY 26 2000
CLERK

No. 99-1761

IN THE

Supreme Court of the United States

NOVARTIS PHARMACEUTICALS CORPORATION
f/k/a SANDOZ PHARMACEUTICALS CORPORATION,

Petitioner,

v.

ANGELA Y. PARNELL, Individually and on Behalf of Her Minor Son Garrett Parnell and CLINTON PARNELL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

JERRY KRISTAL
Counsel of Record
C. SANDERS MCNEW
ELLEN RELKIN
WEITZ & LUXENBERG, P.C.
Attorneys for Respondents
180 Maiden Lane, 17th Floor
New York, New York 10038
(212) 558–5500

159997

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

Table of Cited Authorities ii

Table of Appendices v

Reasons for Denying the Writ 2

I. Review Of The Discovery Order In This Case Necessarily Must Review The Facts Upon Which It Was Based. 2

II. Not One Federal Court Has Found Jurisdiction To Hear An Appeal From An Order Directing The Disclosure Of Confidential Settlement Data. 4

Conclusion 8

TABLE OF CITED AUTHORITIES

Cases:	Page
Alexander v. United States, 201 U.S. 117 (1906) ..	6
Bacher v. Allstate Ins. Co., No. 99–1572 (3d Cir. Apr. 20, 2000)	4, 5
Boughton v. Cotter Corp., 10 F.3d 746 (10th Cir. 1993)	5
Chase Manhattan Bank v. Turner & Newall, PLC, 964 F.2d 159 (2d Cir. 1992)	5
Cobbledick v. United States, 309 U.S. 323 (1940)	6
Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1941)	2, 4, 6
Coleman v. American Red Cross, 979 F.2d 1135 (6th Cir. 1992)	5
Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978)	5
Cunningham v. Hamilton County, 527 U.S. 198 (1999)	6
Dellwood Farms, Inc., v. Cargill, Inc., 128 F.3d 1122 (7th Cir. 1997)	4

Cited Authorities

	Page
Digital Equipment Corp. v. Desktop Direct, Inc., 511 U.S. 863 (1994)	6
FDIC v. Ogden Corp., 202 F.3d 454 (1st Cir. 2000)	5
Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981)	6
In re Ford Motor Co., 110 F.3d 954 (3d Cir. 1997)	4
MDK, Inc. v. Mike's Train House, Inc., 27 F.3d 116 (4th Cir. 1994)	4, 5, 7
National Super Spuds v. New York Mercantile Exchange, 591 F.2d 174 (2d Cir. 1979)	7
Reise v. Board of Regents, 957 F.2d 293 (7th Cir. 1992)	5
Richardson-Merrell, Inc., v. Koller, 472 U.S. 424 (1985)	6
Rouse Construction International, Inc., v. Rouse Construction Corp., 680 F.2d 743 (11th Cir. 1982)	5
Simmons v. City of Racine, 37 F.3d 325 (7th Cir. 1994)	5

Cited Authorities

	Page
Texaco Inc. v. Louisiana Land & Exploration Co., 995 F.2d 43 (5th Cir. 1993)	5
United States v. Ryan, 402 U.S. 530 (1971)	6
Van Cauwenberghe v. Biard, 486 U.S. 517 (1988)	6
Rules:	
Federal Rules of Civil Procedure 26	2
Federal Rule of Evidence 408	2

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Eleventh Circuit Denying Petition For Writ Of Mandamus Dated And Filed September 30, 1999 ..... 1a

Appendix B — Opinion Of The United States Court Of Appeals For The Eleventh Circuit Denying Petitioner's Petition For Panel Rehearing Dated And Filed December 1, 1999 ..... 2a

Petitioner invites the Court to extend the federal appellate jurisdiction to review a discovery order requiring the disclosure of certain past settlement dates and amounts. The order is clearly interlocutory, and clearly bound up with the merits of this action. Petitioner claims that the Court may hear the appeal because it presents "a pure question of law." But the factual and legal premises of Petitioner's claim are unfounded.

Factually, the order does not present a pure question of law. The trial judge entered the order after hearing counsel, based upon his understanding of the action as well as the parties' factual assertions relating to the plaintiffs' need for the material, the defendant's need for protection, and the probative value of the materials sought.

Legally, Petitioner's invitation is utterly unprecedented. Dozens of appellate decisions have held that discovery orders — even orders directing the disclosure of privileged material — are not immediately appealable. Petitioner asks the Court to overlook these long-settled decisions and, instead, create a new exception to the final judgment rule for appeals from discovery orders that supposedly present a "pure question of law." Not one decision from any appellate tribunal, however, has ever purported to expand the reach of the federal appellate jurisdiction to encompass appeals from discovery orders requiring the disclosure of confidential settlement data. And with good reason: The law already affords Petitioner adequate remedies to protect its interests. Such an expansion would violate long-settled principles requiring finality as a predicate for appellate jurisdiction, multiply collateral litigation in nearly every civil action, and (as this case amply demonstrates) give obstreperous defendants a means by which to prolong discovery and delay decisions in the cases against them.

Petitioner thrice sought its relief in the Eleventh Circuit: In a petition for a writ of mandamus, in a request for rehearing en banc the mandamus petition, and in an appeal under the collateral order doctrine established by *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1941). Each time, the Eleventh Circuit denied Petitioner's request. On the point here presented, there is no split in the federal appellate decisions, nor any other colorable justification for further review in this Court. Certiorari should be denied forthwith.

REASONS FOR DENYING THE WRIT

I. Review of the discovery order in this case necessarily must review the facts upon which it was based.

Petitioner argues that the trial judge erred because he ordered Petitioner to produce allegedly-confidential settlement data to Respondents; that Rule 408 of the Federal Rules of Evidence obliged the trial judge to require Respondents to make a "particularized showing" of need for those data before ordering their disclosure; and that the trial judge failed to apply such a standard when he ordered Petitioner to produce the data. *See* Petition at 3. Rule 408, however, governs only the introduction of settlement data at trial; it dos not purport to alter the discovery standards set forth in Rule 26 of the Federal Rules of Civil Procedure.

In any event, Judge Paul did, in fact, conduct the very analysis that Petitioner claims it was denied — *and that analysis is reflected in the body of the order itself.* Respondents had argued that Petitioner was aware of its product's hazards and had decided that it would be more profitable to leave the product on the market and settle such suits as might arise for injuries caused by the product, instead

of reporting the hazards to the FDA and removing the product from the market. Respondents further argued that they needed access to Petitioner's settlement data to help build their case on this point. Judge Paul agreed:

> In the instant case, the plaintiffs want to find out if the settlement agreements reveal a certain pattern of behavior by defendant. The dates and amounts of the settlements might reveal, plaintiffs assert, that defendant knew that Parlodel caused serious adverse effects such as those suffered by Angela Parnell, but that defendant withheld this information from the FDA and the medical community, and misrepresented that Parlodel was safe, pursuant to a financially based strategy to protect its profits. That is, plaintiffs might try to show that it was cheaper for Sandoz to ignore the Parlodel problem and simply settle any cases that came along, rather than reporting the problems to the FDA or pulling the drug from store shelves. The amounts and dates of the settlements would be relevant to this argument.

App. at 3a (Order dated July 9, 1999 (Paul, J.)). Judge Paul entered this order not only after entertaining the parties' submissions and arguments, but also with the benefit of his intimate knowledge of the case, having presided over it throughout its pendency in the Northern District of Florida.

Armed with this understanding of the parties' needs and circumstances, Judge Paul weighed Respondents' "particularized showing" of need for the confidential data against Petitioner's claim of confidentiality before ordering Petitioner to disclose them. Judge Paul's order on its face

conducts the very weighing that Petitioner claims it was denied here. If this Court hears this interlocutory appeal, then it must necessarily review Judge Paul's conclusion that, based on the facts and arguments presented to him, Respondents' need for the data outweighed Petitioner's interest in maintaining their confidentiality. That conclusion is firmly grounded in the facts presented below, it is clearly confided to the sound discretion of the trial judge, and it is certainly not the "pure legal issue" that Petitioner claims it to be.

II. Not one federal court has found jurisdiction to hear an appeal from an order directing the disclosure of confidential settlement data.

All of the Circuits agree that discovery orders are not proper subjects of *Cohen* appeals, even where the order requires a party to disclose sensitive or confidential information such as settlement data.[1] *See, e.g., Bacher v. Allstate Ins. Co.*, No. 99–

1. The Third Circuit, alone among the Courts of Appeals, has allowed *Cohen* appeals where the information to be disclosed is subject to traditional claims of privilege. *See, e.g., In re Ford Motor Co.*, 110 F.3d 954, 957–64 (3d Cir. 1997). The other Courts of Appeals have expressly disclaimed the Third Circuit's allowance of such appeals; as the Seventh Circuit, for example, has observed:

> a discovery order is not deemed collateral even if it is an order denying a claim of privilege. We so held emphatically in *Simmons v. City of Racine*, 37 F.3d 325 (7th Cir. 1994) and *Reise v. Board of Regents*, 957 F.2d 293, 295–96 (7th Cir. 1992), and this is the view of the other circuits as well, with the partial exception of the Third Circuit.

Dellwood Farms, Inc., v. Cargill, Inc., 128 F.3d 1122, 1125 (7th Cir. 1997) (citations omitted). *Accord, e.g., MDK, Inc. v. Mike's*

(Cont'd)

1572 (3d Cir. Apr. 20, 2000); *FDIC v. Ogden Corp.*, 202 F.3d 454, 458 & n.2 (1st Cir. 2000); *MDK, Inc. v. Mike's Train House, Inc.*, 27 F.3d 116, 120–22 (4th Cir. 1994); *Simmons v. City of Racine*, 37 F.3d 325, 327 (7th Cir. 1994); *Boughton v. Cotter Corp.*, 10 F.3d 746, 749–50 (10th Cir. 1993); *Texaco Inc. v. Louisiana Land & Exploration Co.*, 995 F.2d 43, 44 (5th Cir. 1993); *Coleman v. American Red Cross*, 979 F.2d 1135, 1138 (6th Cir. 1992); *Chase Manhattan Bank v. Turner & Newall, PLC*, 964 F.2d 159, 162-63 (2d Cir. 1992); *Reise v. Board of Regents*, 957 F.2d 293, 295 (7th Cir. 1992); *Rouse Construction International, Inc., v. Rouse Construction Corp.*, 680 F.2d 743, 745 (11th Cir. 1982). And rightly so: A *Cohen* appeal lies only where the order is "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468–69 (1978). Appeals from orders compelling the production of sensitive material can never meet this criterion because an aggrieved party may always disobey the order. If the Court enters a contempt sanction that may be purged only by disclosure, then the courts treat that sanction as a final order from which an immediate appeal lies.[2]

(Cont'd)

Train House, Inc., 27 F.3d 116, 120 n.2 (4th Cir. 1994); *Texaco Inc. v. Louisiana Land & Exploration Co.*, 995 F.2d 43, 44 & nn.3 & 4 (5th Cir. 1993). Last month, the Third Circuit expressly recognized that its position had been criticized by the other circuits, and declined to extend it to allow appeals from orders requiring the production of settlement data, such as the order at issue in this appeal. *See Bacher v. Allstate Ins. Co.*, No. 99–1572 (3d Cir. Apr. 20, 2000). As this the order at issue here does not require the disclosure of any privileged material, the Third Circuit's longstanding departure from the norm is not material to this petition. *See Bacher*.

2. A lesser sanction not requiring the disclosure of the contested material does not, of course, threaten immediate or irreparable harm to the aggrieved party, and such orders may be reviewed upon a final judgment in the event the aggrieved party loses.

See, e.g., Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 377 (1981) ("Our rationale has been that in the rare case when appeal after final judgment will not cure an erroneous discovery order, a party may defy an order, permit a contempt citation to be entered against him, and challenge the order on direct appeal of the contempt ruling"); *United States v. Ryan*, 402 U.S. 530, 532–33 (1971); *Cobbledick v. United States*, 309 U.S. 323, 327–28 (1940); *Alexander v. United States*, 201 U.S. 117, 121–22 (1906).

This Court has often counseled that *Cohen* is "a 'narrow exception' . . . whose reach is limited to trial court orders affecting rights that will be irretrievably lost in the absence of an immediate appeal." *Richardson-Merrell, Inc., v. Koller*, 472 U.S. 424, 430 (1985).

> We have accordingly described the conditions for collateral order appeal as stringent, and have warned that the issue of appealability under § 1291 is to be determined for the entire category to which a claim belongs, without regard to the chance that the litigation at hand might be speeded, or a "particular injustice" averted, by a prompt appellate court decision.

Digital Equipment Corp. v. Desktop Direct, Inc., 511 U.S. 863, 868 (1994) (citations omitted), *quoting Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988); *accord Cunningham v. Hamilton County*, 527 U.S. 198 (1999).

Orders compelling the disclosure of allegedly-sensitive material clearly fall outside the ambit of these rules. A party threatened with irretrievable loss by such an order can always stand in contempt of it and take an immediate appeal from the contempt order, if need be. Moreover, as this case

unfortunately illustrates, such interlocutory appeals only delay, not speed, the ultimate disposition of the suit. As one decision correctly concluded:

> A judicially-created exception to nonappealability for categories of sensitive information is the quintessential slippery slope. Many parties faced with discovery requests are apt to regard the information sought as sensitive or confidential and seek, at a minimum, to delay its disclosure through an interlocutory trip to an appellate court.

MDK., Inc., 27 F.3d at 120. Direct appeals from discovery orders ought not be permitted because they encourage piecemeal adjudication of suits by the losers of every discovery dispute. *See MDK, Inc.*, at 121-22; *National Super Spuds v. New York Mercantile Exchange*, 591 F.2d 174, 180 (2d Cir. 1979) (Friendly, J.) ("the requirement of submission to contempt still serves a useful purpose in curtailing appeals, with consequent delay in litigation such as has occurred here").

CONCLUSION

The petition should be denied before the current term of the Court expires, so that the parties may conclude their discovery and proceed to trial without further delay.

Respectfully submitted,

JERRY KRISTAL
Counsel of Record
C. SANDERS MCNEW
ELLEN RELKIN
WEITZ & LUXENBERG, P.C.
Attorneys for Respondents
180 Maiden Lane, 17th Floor
New York, New York 10038
(212) 558–5500

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR WRIT OF MANDAMUS DATED AND FILED SEPTEMBER 30, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-13430-D

IN RE:

NOVARTIS PHARMACEUTICALS CORPORATION,

Petitioner.

On Petition for Writ of Mandamus to the United States District Court for the Northern District of Florida

Before ANDERSON, Chief Judge, and DUBINA, Circuit Judge.

BY THE COURT:

The Petition for Writ of Mandamus is DENIED. *See Rouse v. Construction International, Inc. v. Rouse Construction Corp.*, 680 F.2d 743, 745 (11th Cir. 1982) ("Ordinarily, a litigant seeking to overturn a discovery order has two choices. Either he can comply with the order or he can refuse to comply with the order and contest its validity if subsequently cited for contempt for his refusal to obey.").

The motion of the Chamber of Commerce to file an *amicus* brief is DENIED as moot.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITIONER'S PETITION FOR PANEL REHEARING DATED AND FILED DECEMBER 1, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-13430-D

IN RE:

NOVARTIS PHARMACEUTICALS CORPORATION,

Petitioner.

On Petition for Writ of Mandamus to the United States District Court for the Northern District of Florida

BEFORE: ANDERSON, Chief Judge, TJOFLAT and DUBINA, Circuit Judge.

BY THE COURT:

Petitioner's petition for panel rehearing is DENIED.